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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 533

Case No. 567: ARAIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Arnold Kean;

Whereas, on 18 October 1990, Amer Salih Araim, a staff member of the United Nations, filed an application containing the following pleas:

"II Pleas

The Applicant respectfully requests the Tribunal:

1. To find that the Administration failed to advertise the post of Chief of Committee Services and Research Branch, as required by resolution 33/143 part 1, paragraph 1(a) of 20 December 1978 and therefore violated his right to be considered for that post.

2. To find the Administration has failed to observe staff regulation 4.4 by not giving consideration to the candidacy of the Applicant for the vacant post and resorting instead to outside recruitment.

3. To find that the decision to exclude the Applicant from consideration because of his nationality violates article 101, paragraph 3 of the Charter, as well as this Tribunal's decision in Judgement No. 312 (Estabial).

4. To endorse and reaffirm the unanimous conclusions reached by the JAB [Joint Appeals Board] panel which stated that:

'the decision to fill the post (of Chief of Committee Services and Research Branch in the Centre against Apartheid) through replacement was flawed since it did not meet the conditions laid down for filling the post in this manner;

the appellant, as a staff member, had a statutory right to due consideration for the vacant post and that this right was violated.'

5. To request the Secretary-General to rescind the decision to fill the post of Chief of Committee Services and Research Branch in the Centre against Apartheid by outside recruitment.

6. To provide the Applicant with the opportunity to apply for this post and to ensure that serious consideration be given to the Applicant's candidacy for promotion to the D-1 level to the contested post or any other D-1 post within the Secretariat under staff rule 104.14.

7. To award Applicant, in any case, compensation equal to two years base salary for injury sustained by him as a result of the pre-determination to exclude his candidacy for the post and the resulting degrading treatment that was inflicted on him, as well as the delay in responding to his correspondence."

Whereas the Respondent filed his answer on 31 May 1991;

Whereas the Applicant filed written observations on 27 June 1991;

Whereas the Applicant submitted additional documents on 3 July, 29 August, 25 September and 18 October 1991;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 August 1978 on secondment from the Government of Iraq, on a fixed-term appointment for three years as a Political Affairs Officer at the P-4 level in the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs. On 1 June 1981 he was reassigned to the Committee Services and Research Branch of the Centre against Apartheid, within the same Department. On 8 August 1981 the appointment of the Applicant, who had resigned from the service of his government, was extended for three years. On 1 April 1982

the Applicant was promoted to the P-5 level as Senior Political Affairs Officer. On 1 May 1984 he received a probationary appointment which was converted to a permanent appointment on 1 January 1985.

On 16 January 1990 the Applicant wrote to the Assistant Secretary-General for Human Resources Management concerning the post of Chief of the Committee Services and Research Branch, a D-1 post then occupied by a Ukrainian who was about to retire; the Applicant, having been informed that this post would be filled by replacement from the same nationality, requested that the post be filled through Vacancy Management and that he be given a chance to apply for it. On 6 February 1990 the Director of the Recruitment and Placement Division sent him the following reply:

> "1. ... To date, the Office of Human Resources Management has not received a request for filling of this post either through the procedures of Vacancy Management nor through external recruitment of a candidate from a country whose candidates primarily serve on fixed-term appointments.
>
> 2. However, you may wish to note that the General Assembly in paragraph 4 of Section I of its resolution 35/210 of 17 December 1980 has requested the Secretary-General 'to continue to permit replacement by candidates of the same nationality within a reasonable time-frame in respect of posts held by staff members on fixed-term contracts, whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed-term contracts is not adversely affected.'
>
> 3. While no discussions have been held regarding the filling of the above post, the Secretary-General reserves the right to fill posts in accordance with the provisions of the above paragraph.
>
> 4. I am sending a copy of this memorandum to Mr. Safronchuk [Under-Secretary-General for Political and Security Council Affairs] and Mr. Mousouris [Assistant Secretary-General, Centre against Apartheid] to confirm your interest in this post."

On 6 March 1990 the Applicant requested the Secretary-General to review the decision to fill the post in question by replacement from the same nationality; he specifically requested that the procedure for

recruitment by replacement for this post be halted, that the post be advertised and that his application for the post be considered. On 22 May 1990, not having received a substantive response to his request, the Applicant, who had been unable to obtain the Secretary-General's agreement to direct submission of an application to the Tribunal, lodged an appeal with the Joint Appeals Board and asked for a stay of administrative action under staff rule 111.2(f).

On 25 May 1990 the Assistant Secretary-General, Centre against Apartheid, sent to the Director of the Recruitment and Placement Division a memorandum reading in part:

> "1. As you know, Mr. Vladimir Bruz shall be retiring from his post as Chief of the Committee Services and Research Branch by the end of this month.
>
> 2. In looking for the most appropriate replacement for Mr. Bruz, I have given very careful consideration to all the potential candidates within the Center (special attention was paid to Mr. Araim who is the senior P-5 officer in the Centre, and who has expressed his interest in the post). The need for experience in supervision of research and the requirement for geographical balance in the composition of the senior staff of the Centre also played an important part in my consideration.
>
> 3. Finally, you will be aware of the ongoing developments in South Africa which necessitate that the Centre be in a position to act with speed and flexibility in facing rapidly changing circumstances. That flexibility may also have to include the structure of the Centre. Consequently, I feel that, at this stage, it is desirable to fill this vacancy with a candidate on a fixed-term contract.
>
> 4. Taking all of the above into consideration, as well as the need for filling this vacancy expeditiously, I have recently interviewed four Ukrainian candidates (...) who seemed to fill the necessary requirements.
>
> 5. I have concluded that Mr. Igor Khvorostiany will best be able to serve the needs of the Centre and I would be grateful if you would ensure the earliest retention of his services on this D-1 post for a 2-year fixed-term appointment.
>
> 6. Mr. Khvorostiany is presently the Deputy Director of the Institute of History, Academy of Sciences of the Ukrainian SSR. His functions involve research in contemporary international relations, and administrative supervision of 70 research fellows. ...".

On 29 May 1990 the Assistant Secretary-General, Centre against Apartheid, explained his decision to the Applicant in the following memorandum:

> "Through verbal communications from you, and from copies forwarded to me by OHRM [Office of Human Resources Management] of correspondence between yourself and the Secretary-General, and Mr. Annan [Assistant Secretary-General for Human Resources Management], I have become aware of your interest in the soon-to-be vacant post of Chief, Committee Services and Research Branch.
>
> I am writing to you in order to assure you that I have given serious and full consideration to all potential and eligible candidates within the Centre. Knowing of your interest in this post, and taking due account of your seniority and experience within the Centre, I have paid particular attention to your possible candidature.
>
> Based on my analysis of the future needs of the Centre, and in view of all the circumstances, including the need to retain flexibility in staffing in light of the changing constraints under which the Centre has to operate, as well as the need to maintain a geographic balance in the composition of the senior staff of the Centre, I have decided that the post should be filled on a fixed-term basis and, accordingly, have extended the search for an appropriate candidate outside the Centre. It is therefore my conclusion that the interests of the Centre are best served at this time by your continuing in your present functions.
>
> In closing, I should like to stress the fact that my decision to look elsewhere than the Centre for candidates for this post is not a reflection on your performance in your present post, but a reflection of my desire to fill the vacancy in the most appropriate manner, taking into account all the requirements of the post at this particular time."

On 1 June 1990 the Assistant Secretary-General, Centre against Apartheid, appointed a staff member at the D-1 level in his Office as Acting Chief of the Committee Services and Research Branch. The Applicant protested against that decision on the grounds that he was the senior P-5 staff member in the Branch and that in the past two years he had been appointed Acting Chief of the Branch in the absence of the Chief.

On 4 June 1990 the Joint Appeals Board recommended that action on the contested decision be suspended in accordance with staff rule 111.2(f). This recommendation was accepted by the Secretary-General on 18 June 1990. On 3 July 1990 the Joint Appeals Board submitted its report on the merits of the appeal. The Board's conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 38. The Panel concludes that:
>
> - the decision to fill the post through replacement was flawed, since it did not meet the conditions laid down for filling a post in this manner;
>
> - the appellant, as a staff member, had a statutory right to due consideration for the vacant post and that this right was violated; and,
>
> - the appellant also failed to prove damage suffered as a result of the delay by the Administration in responding to his letters.
>
> 39. Accordingly, the Panel recommends that the contested post be filled through vacancy management and that the appellant be considered fully and fairly along with other candidates."

On 23 July 1990 the Under-Secretary-General for Administration and Management communicated the Secretary-General's final decision to the Applicant in a letter reading in part:

> "...
>
> The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the contested decision and to take no further action on the matter. The Secretary-General's decision is based on the recognized policy and practice of the Organization that certain posts are expressly excluded from the Vacancy Management and Staff Redeployment procedure, namely posts subject to geographical distribution needed to 'permit replacement by candidates of the same nationality within a reasonable time-frame in respect of the posts held by staff members on fixed-term contracts, whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed-term contracts is not adversely affected' in accordance with General Assembly

resolution 35/210 (I) of 17 December 1980, reaffirmed in subsequent resolutions, and as provided for in Administrative Instruction ST/AI/338/Add.5, paragraph 32(h).

In reviewing your case the Secretary-General noted that the Ukrainian Soviet Socialist Republic had 26 staff members on board against a desirable range of 22 to 32, with one national at the D-1 level. The Secretary-General thus decided that it was necessary to confirm the decision to replace Mr. Vladimir Bruz with a staff member of the same nationality in accordance with the provisions of ST/AI/338/Add.5, paragraph 32(h).

The Secretary-General noted that your terms of appointment do not confer on you any right to promotion nor to any particular post or office and that decisions on promotion cannot be challenged on the ground of inadequate consideration or performance or length of service or any similar ground as consistently held by the Administrative Tribunal. The Secretary-General further noted that you were duly considered for the post in question and that the grounds for the contested decision were reasonable.

..."

On 18 October 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration has failed to advertise the post of Chief of the Committee Services and Research Branch as required by General Assembly resolution 33/143, part I, paragraph 1(a). The Administration referred to Administrative Instruction ST/AI/338/Add.5 as an excuse for not issuing a vacancy announcement, but none of the reasons advanced by the Administration was prescribed in Administrative Instruction ST/AI/338/Add.5 or in General Assembly resolution 35/210, which was not even referred to by the Administration.

2. The principle of equitable geographic distribution cannot take precedence over the requirements of promoting staff members on the basis of the highest standards of efficiency, competence and integrity.

3. The refusal of the Joint Appeals Board to award compensation to the Applicant for the serious flaw caused by the Administration's decision

to exclude him from applying for the contested post constitutes an error of law since the Board had found that there had been violations of the Applicant's rights.

4. The Respondent failed to observe staff regulation 4.4 in spite of the fact that the Applicant met all the requirements to be promoted to the post.

5. The factors advanced by the Respondent to justify his decision - the need to retain flexibility in staffing and the need to maintain a geographic balance in the composition of the senior staff of the Centre - were not prescribed by General Assembly resolution 35/210 or Administrative Instruction ST/AI/338/Add.5 as a basis for filling the post through replacement.

Whereas the Respondent's principal contentions are:

1. In making the appointment, the Respondent did not contravene any Staff Regulation, and acted in accordance with General Assembly resolution 35/210 and applicable Instructions. When the Respondent makes an appointment in compliance with General Assembly resolution 35/210 in a case to which that resolution applies, the Respondent does not contravene staff regulation 4.4, or violate the rights of any candidate for the post to which that resolution applies.

2. The Secretary-General is bound to implement the replacement procedure established in resolution 35/210 and continuously reaffirmed in later resolutions. Resolution 35/210 was expressly implemented by the Secretary-General as part of the Vacancy Management's System, pursuant to which the Applicant sought consideration for promotion. Compliance with that resolution, based on the Charter, cannot violate any rights of the Applicant.

3. Notwithstanding the existence of the replacement procedure, the contemporaneous record shows that the Applicant was considered seriously and fairly for the post.

4. The lack of advertisement does not vitiate the solution process if the staff member has been given adequate consideration. The Applicant was aware of the impending vacancy and in fact presented his candidacy.

The Tribunal, having deliberated from 22 to 28 October 1991, now pronounces the following judgement:

I. The Applicant served the United Nations from 1978, receiving a permanent appointment on 1 January 1985. On 1 April 1982 he was promoted to the P-5 level as Senior Political Affairs Officer in the Committee Services and Research Branch in the Centre against Apartheid.

II. On 16 January 1990 the Applicant wrote to the Assistant Secretary-General for Human Resources Management concerning the post of Chief of the Committee Services and Research Branch, a D-1 post then occupied by a Ukrainian who was about to retire. The Applicant, having been informed that the vacant post would be filled by replacement, that is to say by a Ukrainian, requested that the post be filled through Vacancy Management and that he be given a chance to apply for it. On 6 February 1990 the Director of the Recruitment and Placement Division replied that, while no discussions had yet been held regarding the filling of this post, the Secretary-General reserved the right to fill posts in accordance with section I of General Assembly resolution 35/210 of 17 December 1980, that is to say by replacement by candidates of the same nationality as the previous incumbents in respect of posts held by staff members on fixed-term contracts, whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed-term contracts is not adversely affected.

III. In due course the Assistant Secretary-General, Centre against Apartheid, travelled to Kiev and interviewed four Ukrainian candidates, one of whom was selected to fill the post.

IV. The Tribunal notes that the replacement procedure could, under resolution 35/210, be applied "whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed term contracts is not adversely affected". Mr. Bruz, who was due to retire from the post in question, was a Ukrainian employed on a fixed-term contract.

He was one of 27 Ukrainians then employed, a number well within the agreed range of 22-32, so that his replacement by a non-Ukrainian would not have resulted in a great change in the representation of that State. The Tribunal, however, regards this point, and with it the question whether there would be an adverse effect on the representation of Ukraine, as being within the discretion of the Secretary-General in the absence of an error of fact or of law, arbitrariness, prejudice or other extraneous factors.

V. The Applicant having requested that the filling of the post by replacement should be reconsidered, the Assistant Secretary-General, Centre against Apartheid, wrote a memorandum to the Director of the Recruitment and Placement Division on 25 May 1990, in which he stated that he had interviewed four Ukrainian candidates who seemed to meet the requirements of the post and had concluded that Mr. Khvorostiany would best be able to serve the needs of the Centre. On 29 May 1990, the Assistant Secretary-General, Centre against Apartheid, wrote to the Applicant a memorandum in which he explained his decision, stating that he had given "serious and full consideration" to all eligible candidates within the Centre and had paid particular attention to the Applicant's possible candidature. He stated that he had decided that the post should be filled on a fixed-term basis,

> "in view of ... the need to retain flexibility in staffing in light of the changing constraints under which the Centre has to operate [and] the need to maintain a geographic balance in the composition of the senior staff of the Centre".

The Tribunal notes that neither of the reasons given by the Assistant Secretary-General in his memorandum of 29 May 1990 cites resolution 35/210.

VI. The Tribunal observes that the Applicant's claim falls squarely within the jurisprudence established in its recent Judgement No. 492, Dauchy (1990). As in that case, the Tribunal does not doubt that, if the Respondent reasonably considered it necessary to employ the replacement

procedure in order to avoid the adverse effect described in resolution 35/210, he was justified in designating a Ukrainian to fill the D-1 post in question, though he was not obliged to do so.

VII. At the same time, however, the Respondent was obliged to comply with "the paramount consideration in the employment of the staff", set forth in Article 101 of the United Nations Charter, that is to say "the necessity of securing the highest standards of efficiency, competence and integrity". In the circumstances of the present case, the Respondent was obliged to ensure compliance with the "paramount consideration" by giving fair and full consideration to any eligible candidate who aspired to the vacant post and was reasonably capable of fulfilling its needs.

VIII. The Assistant Secretary-General, Centre against Apartheid, in his memorandum of 29 May 1990 assured the Applicant that he had given "serious and full consideration" to all potential and eligible candidates within the Centre. The Tribunal sees no reason to doubt the truth of this statement, but it must take into account the fact that consideration was necessarily given against the background of resolution 35/210. It is apparent to the Tribunal that only if no satisfactory Ukrainian candidate had been found could the Applicant have been selected. Otherwise, very serious and full consideration of the Applicant in all good faith could not have had any effect. It could not, in the words used by the Tribunal in Judgement No. 492, have led anywhere.

IX. It is by no means certain that the Applicant would have been successful if the post had been filled by Vacancy Management, but his chance of success was necessarily precluded once the Respondent had decided to fill the post by replacement. He should receive compensation for the injury he has suffered. In addition, the Tribunal trusts that the Applicant will receive the full and fair consideration to which he is entitled for any vacant D-1 post for which he may be qualified.

X. The Tribunal decides that the Applicant should receive compensation for the injury he has suffered in the amount of $5,000.

XI. For the foregoing reasons, the Tribunal:

1. Awards compensation to the Applicant in the amount of $5,000;
2. Rejects all other pleas.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Arnold KEAN
Member

New York, 28 October 1991

Jean Hardy
Acting Executive Secretary